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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

LARRY LITTLEJOHN, Plaintiff and Appellant, v. COSTCO WHOLESALE CORPORATION, Defendant and Respondent.	A144440 (City & County of San Francisco Super. Ct. No. CGC-13-531835)

Plaintiff and appellant Larry Littlejohn is seeking to recover amounts he paid in sales tax reimbursement to Costco Wholesale Membership, Inc. (Costco) on his purchases of Ensure dietary supplement. When we first considered this lawsuit, we held that Littlejohn was unable to state a claim because he could show neither that the state of California was unjustly enriched by any overpayment of tax on sales of Ensure, nor that the Board of Equalization (Board) ever concluded that refunds were owed on such purchases. (*Littlejohn v. Costco Wholesale Corp.* (2018) 25 Cal.App.5th 251, 263 [235 Cal.Rptr.3d], mod 25 Cal.App.5th 587b (*Littlejohn I*).) Our Supreme Court granted review of our decision, and at the time had before it on review a similar decision and holding in *McClain v. Sav-On Drugs* (2017) 9 Cal.App.5th 684. (*Littlejohn v. Costco Corp.*, review granted Oct. 24, 2018, S250802; *McClain v. Sav-On Drugs*, review granted June 14, 2017, S241471.)

The Court decided *McClain v. Sav-On Drugs* this March and held that in order to have an action for the overpayment of sales tax reimbursement, "plaintiffs must show, as

a threshold requirement, that a prior legal determination has established their entitlement to a refund." (*McClain v. Sav-On Drugs* (2019) 6 Cal.5th 951, 958 (*McClain*).) The Court remanded this case to us for reconsideration in light of *McClain.* (*Littlejohn v. Costco Corp.*, remanded May 22, 2019, S250802.)

Because there has been no legal determination that consumers are entitled to a refund for sales tax reimbursement paid on purchases of Ensure, we again hold that Littlejohn cannot state a cause of action. The trial court's order sustaining the demurrer to Littlejohn's complaint without leave to amend is affirmed.

DISCUSSION

Littlejohn alleged a putative class action complaint against Costco seeking repayment of sales tax reimbursement paid on purchases of Ensure nutritional drinks. (*Littlejohn I, supra,* 25 Cal.App.5th at p. 255.) Beginning in 2006, the Board concluded in an informal opinion of tax counsel that Ensure was a sales tax exempt food product. (*Id*. at p. 256.) Yet, it appears Costco continued to charge sales tax reimbursement and remit the tax on sales of Ensure until 2013. (*Id*. at p. 255.)

Littlejohn's complaint alleged three causes of action against Costco premised on the charged sales tax reimbursement. Two of them challenged the charges as unlawful business practices proscribed by Business and Professions Code section 17200, et seq. The trial court held that these causes of action were governed by *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081 (*Loeffler*), and sustained Costco's demurrer. We agreed. *Loeffler* made clear that "it is for the Board in the first instance to interpret and administer an intensely detailed and fact specific sales tax system governing an enormous universe of transactions. Administrative procedures must be exhausted before the taxpayer may resort to court." (*Loeffler*, at p. 1103.) Accordingly, we rejected Littlejohn's unlawful business practices causes of action because they would have required the court, not the Board, to determine the taxability of Ensure.

Littlejohn's other claim, the one that we address in this remand, was premised on *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790 (*Javor*). There, the court held that customer suits against a retailer to recoup sales tax reimbursement are authorized

when the Board has determined that refunds are appropriate. (*McClain, supra*, 6 Cal.5th at pp. 957-958.) The Board may be joined as a party to such suits. (*Ibid*.) But *McClain* makes clear that a suit asserting a *Javor*-based cause of action is authorized only when consumers establish "as a threshold requirement, that a prior legal determination [by the Board] has established their entitlement to a refund." (*Id*. at p. 958.)

Thus, we consider, in light of *McClain*, whether the record in this case demonstrates the Board has made a precedential determination that sales of Ensure are taxable and consumers are entitled to refunds of sales tax paid on purchases of Ensure between 2006 and 2013. We conclude it has not. The record contains four documents that Littlejohn claims demonstrate such a legal determination.[1] They are a legal ruling of the Board's tax counsel that appears in the annotations, a letter from tax counsel to an individual consumer, a letter from the Board to Littlejohn, and a 2013 Tax Information Bulletin published by the Board. All of them contain a statement that sales of Ensure beginning in 2006 are not taxable. Indeed, it appears the Board has not taken action to collect tax on the sales of Ensure products since 2006. That much seems clear and cannot be reasonably disputed.

But the fact the Board has taken a position that a particular item is not taxable, does not establish consumers' right to bring a *Javor* based lawsuit. Indeed, the *Javor* remedy was denied in *McLain* even though a Board regulation had declared sales by pharmacists of glucose test strips and skin puncture lancets to be non-taxable. (*McClain, supra*, 6 Cal.5th at p. 955.) Here, none of the documents Littlejohn relies upon to establish his right to sue, have the binding or precedential effect of a Board regulation. The legal ruling of counsel that appears in the annotations neither has the force and effect of a regulation (Gov. Code, § 11340.9, subd. (b)), nor may it be relied upon by anyone other than the "person to whom it was originally issued or a legal or statutory successor to that person." (Cal. Code Regs., tit. 18, §§ 1705, 5700 subd. (c), 5247 subd. (b)) While annotations reflect an agency interpretation of the business effects of a wide range of

[1] The trial court properly took judicial notice of each of the documents.

transactions, they do not have the force and effect of law. (See *Dell, Inc. v. Superior Court* (2008) 159 Cal.App.4th 911, 932-933.) As we said in *Littlejohn I*, "when the Board determines to issue a decision with binding effect, it does so in the form of a 'precedential decision' of the Board." (*Littlejohn I, supra*, 25 Cal.App.5th at p. 261.) The legal ruling of counsel did not determine that tax paid in error on sales of Ensure products must be refunded.

The other documents on which Littlejohn relies provide no better support for his claimed right to sue. We addressed them all in *Littlejohn I*, and our analysis has not changed. "For similar reasons that we decline to give legal effect to the opinion of counsel, we decline to give effect to the March 2013 letter by a Board auditor. The March 13 letter is written in response to an e-mail inquiry by a consumer. It is not advice to a taxpayer, nor does it address particular sales transactions over a specific time. It merely directs the inquiring consumer to address a possible claim of refund with the appropriate retailer. Neither is the information in The Tax Information Bulletin a precursor determination by the Board, for the simple reason that it is a newsletter, not a decision of the Board, a legal opinion, or even a reply to a specific factual inquiry. The Tax Information Bulletin provides general information to inform taxpayers and interested parties "in simplified terms the most common areas of noncompliance" they are likely to encounter. (See Rev. and Tax. Code, § 7084.) There is no basis to give this document legal effect." (*Littlejohn I, supra*, 25 Cal.App.5th at p. 262.)

As we said in *Littlejohn I*, even though the Board considers sales of Ensure non-taxable, "none of the documents [Littlejohn relies upon] were issued in response to an inquiry about refunds or address whether tax paid by retailers on sales of Ensure products would be refunded." (*Littlejohn I, supra*, 25 Cal.App.5th at p. 260.) The absence of any request to the Board for, or determination that, refunds are due counsels us to apply the rule announced in *McClain* to preclude a *Javor* remedy in this case.

DISPOSITION

The judgment is affirmed.

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Siggins, P.J.

WE CONCUR:

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Fujisaki, J.

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Petrou, J.

Littlejohn v. Costco Whole Sale Corp., A144440